Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1979

No. 79-1140

LEONARD J. BURDETTE,

Petitioner,

VS.

INDIANA & MICHIGAN ELECTRIC COMPANY,

a corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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INDEX

	Page
TABLE OF CASES	2-3
OPINIONS BELOW	4
JURISDICTION	4
STATUTE INVOLVED	4
QUESTION PRESENTED	4
STATEMENT	5-10
ARGUMENT	10-14
CONCLUSION	14
CERTIFICATE OF SERVICE	15

TABLE OF CASES

	Page
BAKER v. PACIFIC FAR EAST LINES, INC., 451 F. Supp. 84 (9th Cir. 1978)	10, 12
BUNA v. PACIFIC FAR EAST LINES, INC., 441 F. Supp. 1360 (9th Cir. 1977)	10, 12
BURNS v. ANCHOR WATE CO., 469 F. 2nd 730 (5th Cir. 1972)	10, 12
GIANFALLA v. TEXAS CO., 350 U.S. 879 (1955)	10
GRIFFITH v. WHEELING-PITTSBURGH STEEL CORPORATION AND AMERICAN COMMERCIAL LINES, INC. 521 F. 2d 31 (3rd Cir. 1975)	10
LEWIS v. ROLAN E. TREGO & SONS, 501 F. 2d 372 (4th Cir. 1974)	10
OFFSHORE COMPANY v. ROBISON 226 F. 2d 769 (5th Cir. 1959)	5, 9, 10, 11, 12
SENKO v. LACROSSE DREDGING CORP., 352 U.S. 370 (1957)	10
SHOWS v. HARBOUR 575 F. 2d 1253 (8th Cir. 1978)	10
SLATTON v. MARTIN K. EBY CONSTRUCTION CO., INC. 506 F. 2d 505, 510 (8th Cir. 1972)	5, 13

SOUTH CHICAGO COAL & DOCK CO. v. BASSETT, 309 U.S. 251 (1940)	10
TELLER v. ATLANTIC COAST LINE RAILROAD COMPANY, 319 U.S. 54 (1943)	10
WHITTINGTON v. SEWER CONSTRUCTION COMPANY, INC., 541 F. 2d 427 (4th Cir. 1976)	10, 11, 12

OPINION BELOW

The Opinion delivered by the United States Court of Appeals for the Fourth Circuit, Unpublished, is copied and attached to the Petition as Exhibit "A" in the Appendix. The Opinion of the District Court is attached in the Petition as Exhibit "B" in the Appendix. Respondent adopts verbatim the copies of the Opinions deivered by these two Courts.

JURSIDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

QUESTION PRESENTED

Did the District Court properly charge or instruct the jury regarding the criteria they were to use to determine Petitioner's eligibility as a seaman for purposes of recovery under the provisions of the Jones Act, 46 U.S.C. §688?

STATUTE INVOLVED

The statutory provision involved is the Jones Act, 46 U.S.C. §688.

STATEMENT

The statement of facts of Petitioner was prepared in apparent disregard of the applicable principles of review that the evidence is to be viewed and construed favorably to the prevailing party below, and all reasonable inferences of which the evidence is fairly susceptible should be drawn in support of, and not against, the judgement rendered below. Slatton v. Martin K. Eby Construction Co., Inc. 506 F. 2d 505 (8th Cir. 1974) cert. denied, 421 U.S. 931, 95 S. Ct. 1656, 44 L. Ed. 2d 88 (1975).

Respondent adopts a portion, only, of the Petitioner's Findings as a part of his Statement. This adoption includes the following pages of Petitioner's Statement on pages 1, 10, 11, 12 and the remaining part of page 14. Respondent does not adopt the version of Petitioner's requested charge, as drafted, in his interpretation of Offshore Company v. Robison, 266 F. 2d 769 (5th Cir. 1959), as set forth on part of pages 8 and 9 of his Statement.

Further, Respondent asserts Petitioner's version in his Statement on pages 4, 5, 6, 7 and continuing on page 8, does not fully set forth essential facts brought out at the trial which tend to greatly defeat Petitioner's alleged seaman status.

Respondent, Indiana & Michigan Electric Company, is primarily engaged in river transportation of coal on the Kanawha and Ohio

Rivers. On June 14, 1974, Petitioner was employed as a laborer at Respondent's river facilities at Cedar Grove, West Virginia, on the Kanawha River. Petitioner's Complaint states that as a result of Respondent's alleged negligence he was caused to suffer a disabling injury to his back, while he was performing the duties of prying up a deteriorated deck floor from a coal barge moored at the Respondent's landing.

The evidence offered during the course of the trial regarding Petitioner's employment status and duties at the date and time of his alleged injury, was offered by Petitioner, Curtis Starcher and John Nibert, Respondent's dock superintendent.

Petitioner's witness, Curtis Starcher, testified that he was a co-employee of Petitioner at the date and time of the alleged injury. Witness Starcher testified that the Petitioner had been in the employment of the Respondent for approximately two months prior to June 14, 1974. However, witness Starcher had not worked with Petitioner during that full period of time because Starcher had been previously employed by Respondent in the capacity of a seaman, classification of a watchman, aboard one of Respondent's motor vessels, before he took the job of laborer in the land bound work gang with the Petitioner and others.

Witness Starcher, testified to the clear and distinct differences in the duties that he and Respondent had as dock-side laborers on June 14, 1974, from that of the duties of a seaman or watchman aboard a motor vessel that he had just previously served and experienced. Starcher described his work and duties as a seaman and a member of a crew of a motor vessel. Starcher stated that he was required to work twenty-one days on the motor vessel and then would be allowed twenty-one days off the motor vessel. Starcher stated that he would eat and sleep on the motor vessel during this twenty-one day tour of duty because the vessel would be in navigation for the purposes of transporting coal in barges upon the Kanawha River. Witness Starcher stated that he wanted to quit the job of watchman, a seaman, because his permanent twenty-one day connection with the motor vessel upon which he was assigned was too long of a time period to stay away from home.

Curtis Starcher requested that the Respondents transfer him to a land based job so he could be home all the time. Respondent honored Starcher's transfer request and employed him in the capacity of a laborer. Starcher's testimony states now that he went home every night after he finished his eight hours of laboring duty, ate and slept at home. Witness Starcher further testified that duties of a laborer would be determined on a day to day base by John Nibert, Respondent's

dock superintendent. The testimony of this witness clearly establishes that no laborers were ever assigned to any of Respondent's motor vessels and that the duties of laborers, including Petitioner, on June 14, 1974, were among other things, painting and cleaning boats and barges, cutting cables, cutting grass, cleaning up roads and ditches, and getting groceries.

Petitioner's testimony corroborated that of Starcher in distinguishing between laborer and seaman. When asked if Petitioner was a member of any crew or vessel owned by the Respondent at the date and time of the alleged injury, his answer was "No, sir". Petitioner further stated that he did not take any of his meals aboard Respondent's motor vessels or stay there over night, and that he went home after finishing his duties as a laborer. Petitioner was definitely aware of his employment classification because his reiterated at the trial the answer to a question propounded previously at a deposition that his classification at the date and time of June 14, 1974, was that of a general laborer.

The evidence of John Nibert described the duties of the Petitioner in his laborer classification as that of shoveling coal, snow, mud, cleaning out ditches, cleaning, painting, helping with the docking of Respondent's vessels on the Respondent's real estate, together with, on occasions, putting new wooden decks in coal barges.

At the conclusion of the evidence before the district trial Court and jury, Petitioner submitted his requested charge, incorporating therein his interpretation of the Robison, supra, decision as it refers to the definition of a seaman within the context of the Jones Act, 46 U.S.C. §688. The District Court after considering Petitioner's request, used the accepted, undisputed and clear definition of seaman formulated by this Honorable Supreme Court of the United States in many previous decisions. Respondent will not reiterate the District Court's charge in regard to the definition of a seaman but will adopt in its entirety the quoted material contained in Petitioner's Statement commencing at the middle of page 9 and continuing through page 12 and then recontinuing to its finality on page 13 of Petitioner's Statement.

After twice deliberating, the jury returned with a verdict for the Respondent and Petitioner appealed to the United States Court of Appeals for the Fourth Circuit, assigning as error the Court's instruction with regard to the definition of a "seaman". Argument was scheduled and completed on October 1, 1979, and a decision was rendered on October 26, 1979, in the form of an Unpublished, PerCuriam Opinion affirming the lower District Court. Respondent would adopt verbatim Exhibit "A", pages one and two in the Petition for Writ of Certiorari setting forth this opinion #78-1031, in its Statement.

ARGUMENT

There is no ambiguity in the Federal Circuit Courts of Appeal concerning the correct definition for the application of the term seaman within the meaning of the Jones Act, 46 U.S.C. §688. The criteria to be used in the determination of eligibility of an employee as a Jones Act seaman has been consistently applied throughout the Federal Circuit Courts of Appeal, Senko v. LaCrosse Dredging Corp., 352 U.S. 370, (1957); Gianfalla v. Texas Co., 350 U.S. 879 (1955); Teller v. Atlantic Coast Line Railroad Company, 319 U.S. 54, (1943); South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251 (1940); Whittington v. Sewer Construction Company, Inc., 541 F. 2d 427 (4th Cir. 1976), Griffith v. Wheeling-Pittsburgh Steel Corporation and American Commercial Lines, Inc., 521 F. 2d 31 (3rd Cir. 1975); Lewis v. Rolan E. Trego & Sons, 501 F. 2d 372 (4th Cir. 1974); Baker v. Pacific Far East Line, Inc., 451 F. Supp. 84 (9th Cir. 1978), Buna v. Pacific Far East Lines, Inc., 441 F. Supp 1360 (9th Cir. 1977), Shows v. Harbour, 575 F. 2d 1253 (8th Cir. 1978), Burns v. Anchor Wate Co., 469 F. 2d 730 (5th Cir. 1972), Offshore Company v. Robison, 226 F. 2d 769 (5th Cir. 1959).

The Petitioner would have this court believe that the rule being applied by the Fourth Circuit for the determination of eligibility of an employee as a Jones Act seaman is drastically different than that ap-

plied in the other Federal Circuit Courts of Appeal. This is not so.

The Petitioner further asserts that the correct definition of a seaman to be used under the Jones Act is to be found in the case of Offshore Company v. Robison, 226 F. 2d 769 (5th Cir. 1959). This assertion by the Petitioner is without merit in that Robison, supra, did not define the term "seaman" and, in fact, the Court in Robison, supra, confined itself to a determination of when the issue of seamanship should go to the jury or when it should be decided by the trial Court. In the case at hand, the determination of seamanship was presented to the jury and the jury was properly charged as to essential elements to be used in making the determination of employee status under the Jones Act.

The Respondent does not deny that Robison, supra, has been apllied in virtually every Circuit in the country but once again the Respondent must point out that Robison, supra, stands for the proposition that in any instance where there is a question as to whether an employee would qualify for coverage under the Jones Act that question is to be determined by a jury. Whittington, supra, as noted by the Fourth Circuit's affirmation of the District Court's decision in this case, outlined the elements of the three pronged test to be used by the jury in making this determination.

Two Ninth Circuit cases indicate that the three pronged test as used in Whittington, supra, is the correct test for the determination of seaman status under the Jones Act. In Baker v. Pacific Far East Lines, Inc., 451 F. Supp. 84 (9th Cir. 1978) the plaintiff spent more than ninety per cent of his overall time working on barges or ships; however, after applying the three pronged test, the plaintiff was found by the jury not to meet the criteria essential for coverage as a seaman under the Jones Act and recovery was denied. The second Ninth Circuit case, Buna v. Pacific Far East Lines, Inc., 441 F. Supp. 1360 (9th Cir. 1977) specifically endorsed the Whittington, supra, criteria and cited Burns v. Anchor Wate Co., 469 F. 2d 730 (5th Cir. 1972), and Robison, supra, as being consistent with the holding in that decision.

The Petitioner asserts that charge one as proposed by the Petitioner to the District Court is a correct statement of law as applied in Robison, supra. A close examination of that charge as presented to the Court would reveal omissions in the language that are essential elements to establish Jones Act coverage as per Robison, supra. Specifically, the charge offered by the Petitioner failed to make note of any requirement that the injured workman be assigned permanently to a vessel or perform a substantial part of his work on a vessel. These requirements were included in the original decision of Robison, supra,

and were attached to the Petitioner's brief to the Fourth Circuit of Appeals as an Appendix.

The record fails to substantiate any permanent assignment of the Petitioner to any vessel in the Indiana & Michigan fleet or that he had ever performed duties of a crew member on any vessel within the Indiana & Michigan fleet. As the Fourth Circuit Court of Appeals correctly noted on page two of Petitioner's Exhibit "A"

> "Moreover, a finding that plaintiff was not a seaman for Jones Act purposes is iminently on the record in this case."

Respondent submits that the question of Petitioner's qualifications as a Jones Act seaman was properly presented to the jury, together with the necessary criteria for the determination of said eligibility as a Jones Act seaman and the jury, upon the evidence presented at the trial, found for the Respondent. Further, in a similar case decided in the Eighth Circuit involving a jury's determination of employee eligibility as a seaman under the Jones Act the Court stated:

> "As an appellate Court, we must view the evidence in the light most favorable to sustaining the jury's verdict, and we accept as established all reasonable inferences which tend to support the jury's determination. Slatton v. Martin K. Eby Construction Co., Inc. 506 F. 2d 505, 510 (8th Cir. 1974) cert. denied, 421 U.S. 931, 95 S. Ct. 1657, 44 L. Ed. 88 (1975)"

Therefore, Respondent asserts that the jury was properly charged as to the criteria to be used for the determination of Petitioner's eligibility as a Jones Act seaman under 46 U.S.C. §688 and the jury, after considering all of the evidence, found for the Respondent and against the Petitioner.

Additionally, Respondent asserts there is no compelling reason nor any showing by the Petitioner of substantial disagreement among the Circuit Courts of Appeal regarding the applicable criteria to be used in the determination of employee eligibility as a Jones Act seaman to warrant a grant of Certiorari in this particular case.

CONCLUSION

For the foregoing reasons, Indiana & Michigan Electric Company submits that the Judgement Order entered September 12, 1977, in the United States District Court for the Southern District at Huntington and the Order entered the 26th day of October, 1979, in the Fourth Circuit Court of Appeals be affirmed.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served the foregoing Respondent's Brief in Opposition to Granting Petitioner's Petition for Writ of Certiorari by posting in the United States mails, a true copy thereof, to his attorneys, George A. Daugherty to his address, No. 3 Capitol Street, Charleston, West Virginia, 15301 and John Amick to his address, Security Building, Charleston, West Virginia, 25301, in properly stamped envelopes, prepaid postage, first class, this 23rd day of February, 1980.

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